THE EFFECT OF A PARDON FOR A FIRST OFFENSE UPON THE PUNISHMENT TO BE INFLICTED FOR A SECOND OFFENSE.—Probably the most difficult questions that arise in respect to pardons are those in regard to their effects in various relations. The effect of a pardon upon the punishment to be inflicted on offenders under statutes of the "habitual criminal" type was considered in the recent case of *People* v. *Carlesi* (1913) 139 N. Y. Supp. 309. Carlesi was convicted of forgery in the second degree as a second offense, and sentenced to the cumulative punishment provided by the statute for second offenses. At the trial the evidence showed that in 1892 he had been convicted of crime in New York, and that he had served his sentence, and had received a pardon from the President of the United States in 1904. On appeal, he urged that he was improperly convicted as a second offender for the reason that the prior conviction could not after a pardon be the basis of a conviction of a subsequent crime as a second offense. The judgment of conviction was affirmed.

The authorities on this question are not numerous. The New York court had previously held, in *Peo.* v. *Price*, 53 Hun. 185, 6 N. Y. Supp. 833, that a conviction for a second offense was proper although the first offense, which was committed in Georgia, had been pardoned by the Governor of that State. That case was partially put on the ground that the powers of the legislature of the State of New York were not restricted by the Constitution or laws of the State of Georgia, and the court in the principal case evidently does not regard that case as controlling the exact question here presented.

The Virginia court, in *Edwards* v. *Com.*, 78 Va. 39, 49 Am. Rep. 377, takes the position that a pardon absolutely and entirely blots out the first offense. The court says, "A pardon is defined to be a remission of guilt. * * * As the first offense was in legal contemplation blotted out, and its consequences removed by the pardon of the governor, it must be regarded for the purposes of this case as though it had never been committed." This view has the support of Mr. BISHOP. 1 BISHOP, NEW CRIM. LAW, § 919, reads, "If a second offense is made by statute more heavily punishable than the first, then if the first is pardoned it is obliterated. The consequence of which is that a like offense afterward committed is not a second, and is punishable only as a first. The pardon by annulling the one offense prevented the other from being second." This view has been adopted in Ohio. *State* v. *Martin*, 59 Ohio St. 212, 52 N. E. 188, 43 L. R. A. 94. And there is dictum in Pennsylvania to the same effect. *Com.* v. *Morrow*, 9 Phila. 583. 2 LILLY'S ABR. 270 reads as follows: "A general pardon doth discharge not only the punishment which was to have been inflicted upon the person that did commit the offense pardoned, but also the guilt of the offense itself. It pardons *culpa* so clearly that, in the eye of the law, the offender is as innocent as if he had never committed the offense." In *Carlisle* v. *U. S.*, 16 Wall. 147, the Supreme Court of the United States said, "All have agreed that the pardon not merely releases the offender from punishment prescribed for the offense, but that it obliterates in legal contemplation the offense itself." Similar language is found in *Ex parte Garland*, 4 Wall. 333, and in *Knote* v. *U. S.*, 95 U. S. 149. However, as was noted in *Peo.* v. *Price*, *supra*, "In none of the

cases in the Supreme Court of the United States was the pardoned person on trial for a second offense."

The Kentucky rule is announced in *Mount* v. *Com.*, 63 Ky. 93, as follows, "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more. It neither did nor could relieve any penal consequences resulting from a different offense, committed after the pardon, and never pardoned. * * * The augmented punishment is for the last, and not at all for the first offense; and, of course, a pardon of the first could in no way or degree operate as a pardon of the last offense or remission of any portion of the punishment denounced for the perpetration of it." This view is adhered to in subsequent Kentucky cases. *Herndon* v. *Com.*, 105 Ky. 197; *Stewart* v. *Com.*, 2 Ky. Law Rep. 386. In 24 A. & E. ENCL. 2d Ed. 587, this view is adopted as the proper one, and in 8 A. & E ENCL., 2d Ed. 492, the following language is used: "It seems to be the general rule that the fact that a person has been pardoned for his first offense does not relieve him from liability to cumulative punishment in case he is again convicted of crime. * * * The statutes of several states clearly negative the idea that a pardon can have any such effect." Missouri has such a statute. MO. ANN. STAT. § 2379. And it seems that at one time New York had a similar statute in regard to petit larceny. *Stevens* v. *Peo.*, 1 Hill 261.

From a review of the authorities it appears that the precise question presented to the New York court had been directly decided in but three states. It is clear that the decisions in Virginia and Ohio, on the one hand, and in Kentucky, on the other, are in direct conflict. The fundamental question involved is simply this: What is the effect of pardon? Does it operate as a "remission of guilt," or as a "remission of the punishment of guilt?" The more logical view seems to be that a pardon is a remission of the punishment, and nothing more. The United States Supreme Court has defined a pardon as follows: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for the crime he has committed." *U. S.* v. *Wilson*, 7 Pet. 150. A pardon is an exemption from the punishment. It is true that in *Ex parte Garland*, *supra*, the Supreme Court said that a pardon makes the defendant "a new man, and gives him a new credit and capacity." But although a pardon may give a man a "new credit and capacity" in civil matters, it cannot be said that it gives him a new capacity to commit crime. Moreover, the rule adopted by the Court in the principal case is the only rule which is in accordance with the purpose of the legislature in enacting statutes providing for increased punishment. "It is all right that the degree of punishment should be measured by the criminality of the individual. * * * The previous punishment having failed to reform him, his guilt, upon his further offending, is greater, and being so, severer treatment is needed to compel him to reform his ways, and in furtherance of the effect to prevent crime." *Peo.* v. *Sickles*, 156 N. Y. 541. It is the second offense that is punished. The second offense evidences a greater degree of criminality and therefore calls

for an increased punishment. The increased punishment is given because the second offender is guilty of a greater criminal act. And it would seem that a man who offends for a second time after having received a pardon for his first offense, thereby demonstrates that his degree of criminality is—at least—fully equal to that of a man who has never been favored with the indulgence of the Executive. J. M. H.

WHAT CIRCUMSTANCES WILL RAISE A PRESUMPTION OF UNDUE INFLUENCE IN THE EXECUTION OF A WILL.—The Court of Appeals of New York and the Supreme Court of Iowa have recently handed down decisions in which the courts take opposing views as to the shifting of the burden of proof in cases of alleged undue influence in the execution of wills. In the New York case, the contestant showed that the principal residuary legatee was the attorney who drew the instrument. The Court of Appeals held that this did not raise a presumption of undue influence, and that the burden of proof remained on the contestant. *In re Kindberg's Will,* 100 N. E. 789. In the Iowa case it was shown that the will made large provision for decedent's physician and that he had been instrumental in having it drawn; it was held that the circumstances raised a presumption of undue influence. *Cash* v. *Dennis,* 139 N. W. 920.

In probating a will the burden of proof is on the proponent to establish that it is the will of the deceased. Various presumptions arise, however, which shift the burden of proceeding: when the proponent has shown the due execution of the will and the death of the maker, he has established a *prima facie* case; the burden is then on the contestant to establish affirmatively the grounds on which it should be declared that the will offered is not the will of the decedent. So far all the courts are substantially agreed. But some authorities maintain that when the contestant has shown a large gift to a certain person and the existence of a fiduciary relation between such person and the decedent, e. g. attorney and client, physician and patient, guardian and ward, priest and communicant, that such establishes a *prima facie* case against the will and places the burden as to that issue upon the proponent. *Jones* v. *Roberts,* 37 Mo. App. 163; *Bridwell* v. *Shank,* 84 Mo. 455, 467; *Maddox* v. *Maddox,* 114 Mo. 35; WOERNER, AM. ADM. § 32.

Equity, since earliest times, (*Scribblehill* v. *Brett,* 1 Brown Cas. Pal. 57) by an unbroken current of authority has held that as regards transactions *inter vivos,* any fiduciary relation raises a presumption of undue influence and the one who asserts such invalidity has merely to show such relation to establish a *prima facie* case.

Many cases contain statements which might lead one to conclude that the same rule has generally been applied to wills, but such is not the case. There are very few courts which hold that mere fiduciary relationship establishes such a presumption. The relationship is always accompanied by some attendant circumstance as that the same person also drew the will or procured it to be drawn, gave directions as to its contents to a draughts-